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An unending variety of topics

Wednesday, October 19, 2005

Surveillance and technological "neutrality"

"Technological neutrality" is a hot topic in government surveillance law. It posits that new technologies (such as WiFi and cryptography) that enhance privacy should be required, by law, to be altered in order to provide governments the same amount of ability to spy on private conversations as they had with previous technology. The argument is that we must decrease our legal rights in order to hold constant governments' abilities to spy on us.

A big assumption lies in choosing the technological baseline of surveillance. Usually this is, conveniently for governments, chosen to correspond to some high-water mark of surveillance, for example the copper era when phone exchanges were centralized and wiretaps required only splicing together copper cables.

The most accurate baseline, however, is the baseline abilities of surveillance that our laws, especially our Constitutional laws, were designed for. In the United States, the Fourth Amendment was designed for a world in which governments had *no* ability to wiretap. If a government wanted to spy on your conversation they had to do it the same way they can still do now -- by following you around and listening in person (or at least in the next room). On very rare occasions, you might write a letter and the government might open your mail, for which "paper" the Fourth Amendment required a search warrant based on swearing under oath that there was probable cause to suspect a crime related to that mail.

In short, the "technological neutrality" argument, if applied correctly, leads to the opposite conclusion reached by its proponents. Rather than reacting to privacy technologies by reducing further our legal rights, instead we should be expanding our legal privacy rights and encouraging privacy technologies until we return to the baseline of government surveillance abilities for which the Fourth Amendment and similar protections were designed.

Posted by Nick Szabo at 3:47 PM

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Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

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Serveto said...

I'll have to remember this if I ever study Criminal Procedure.

4:20 AM

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